Lim Hun Swee v Malaysia British Assurance Bhd (currently known as Allianz General Insurance Malaysia Bhd) & Ors (judgment creditors)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS P-03–125 OF 2007, P-03–137(A) OF 2007, P-03–146 OF 2007, P-03–172 OF 2007 AND P-02–624 OF 2007
ABU SAMAH, RAMLY ALI AND APANDI ALI JJCA
27 MAY 2010

Bankruptcy — Discharge — Appeal by judgment creditors against discharge order — Reports by Director General of Insolvency ('DGI') incomplete — Whether discharge should be allowed — Whether there was full and frank disclosure of all relevant and material facts in DGI's reports — Whether DGI carried out proper investigation into bankrupt's affairs and assets — Statement of affairs lodged late without excuse — Whether amounted to offence — Whether in public interest to allow discharge — Bankruptcy Act 1967 ss 33, 34 & 36

Prior to being adjudicated a bankrupt, Lim Hun Swee ('the bankrupt') was a director in Filotek Sdn Bhd, Filotek Trading Sdn Bhd, Filotek Properties Sdn Bhd and Filotek Holding Sdn Bhd and had the care and control of all the companies' business transactions. On 23 November 2000, upon the bankrupt's own application a receiving and adjudication order ('ROAO') was made against him. Subsequently on 3 June 2003, the bankrupt filed an application for an order of discharge under s 33 of the Bankruptcy Act 1967 ('the Act'). The Director General of Insolvency ('the DGI') prepared the report dated 26 January 2004 ('the first report') to facilitate the determination of the said application, as required under s 33 of the Act. After hearing objections raised by the judgment creditors, the DGI's first report was followed by two additional reports dated 12 May 2004 ('the second report') and 2 August 2004 ('the third report'). According to the DGI's second report, the bankrupt's unsettled debts at the relevant time amounted to RM20,336,910.46, while the credit balance in the estate of the bankrupt was RM37,442.38. The report also set out that the bankrupt's family members had agreed to contribute a sum of RM200,000 to help the bankrupt to partly settle the debts and that the total sum of RM237,442.38 was sufficient to declare dividends of 1% to the 32 creditors who had filed their proof of debts with the DGI. On 23 August 2004, the deputy registrar granted the bankrupt a conditional discharge subject to him being made to pay a sum of RM5,000 per month for a period of five years. The dissatisfied judgment creditors appealed against the deputy registrar's decision. These appeals were dismissed by the High Court judge but the judge varied the conditional order to payment of RM10,000 per month for a period of ten years. The bankrupt was not satisfied with the variation of the conditional

order requiring him to pay the sum of RM10,000 per month for ten years while the four judgment creditors ('the JCs') were not satisfied with the discharge order. Hence the five appeals before this court. It was the JCs contention that this was not an appropriate case for the judge to exercise his discretion to discharge the bankrupt. They submitted that the DGI had failed to carry out a proper investigation into the bankrupt's affairs and assets and that the DGI's reports were incomplete. The JCs also submitted that the dividend of 1% to be paid to the 32 creditors for the discharge was manifestly low and did not comply with s 33(4) of the Act, which required at least 50% dividend to be paid to them. The bankrupt, on the hand, contended that the judge's decision to discharge him from bankruptcy was correct as the main objective of bankruptcy was to relieve the bankrupt from his debts and to enable him to make a fresh start as soon as he was discharged by the court and that it was against public interest for an individual to remain a bankrupt. The sole issue for determination in these appeals was whether the discharge should be allowed in the present circumstances.

Held, allowing the appeals by the JCs with no order as to costs and dismissing the bankrupt's appeal with no order as to costs:

(1) In an application for a discharge, the bankrupt could not be allowed to obtain undue advantage of the weaknesses in the DGI's incomplete report. In the present case it was noted that the DGI's report was both brief and incomplete. The fact that three reports had to be prepared by the DGI during the hearing of the discharge application showed that the DGI had not carried out a thorough investigation. Further the reports made no mention of the bankrupt's monthly expenses and there was a contradiction in the reports as to the income of the bankrupt, thereby making the report unreliable. According to the first report the bankrupt's earnings were RM3,500 per month but the second report stated that his earnings were RM3,000 per month. Yet, if the bankrupt's alleged monthly expenses of RM1,200 to his former wife, house rental of RM1,000, monthly payment of RM1,000 to the DGI, personal expenses of RM800, and of course EPF and monthly income tax deduction were true then his expenses would be more than his alleged salary of RM3,500. As it stood these and other relevant questions could only be answered if the DGI had carried out a proper thorough investigations of the bankrupt's full affairs. There must be full and frank disclosure of all the relevant and material facts in the DGI's reports (see paras 18, 21–22, 29–30, 49 & 51).

(2) The DGI should have investigated the truth of the statement as to the payment of RM200,000 by the relative of the bankrupt and the mother's company owned apartment to ensure that the bankrupt had no hidden assets stashed away whether in his name or the name of others (see para 26).

(3) Although a report by the DGI was a mandatory requirement in an application for an order of discharge by a bankrupt, this did not mean that the court was bound to accept the statements contained in such a report. The court was duty bound to scrutinise the truth and reliability of the statements in the report and was not bound to accept those statements, which are incomplete or misleading. This is particularly so, as in the present case, where the amount of debts involved were huge (about RM25m); where the bankruptcy was initiated by the bankrupt himself; the application for an order of discharge was filed two years and ten months after the AORO was granted; and where the dividend declared was only 1% of the total debts (see para 33).

(4) Under s 33(6)(a) of the Act, the DGI was duty bound to specifically investigate and ascertain the fact whether the bankrupt had omitted to keep such books of account as to sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy or within such shorter period deemed reasonable in the circumstances. Section 33(6) provides for 13 factual situations, ie sub-s (6)(a)–(m), which could bar the court from granting an order of discharge or to suspend the operation of such an order. However the DGI's reports neither touched on these matters nor showed that any investigation was done on such matters. This was a gross insufficiency that would badly affect the reliability of the DGI's reports. At the time of the application for the discharge, situations as envisaged under s 33(6)(e), (f), (b) or (m) had existed but unfortunately the DGI's reports failed to highlight on these matters in order to assist the court in its determination on the application for an order of discharge (see paras 32, 34–36 & 38–40).

(5) Under s 16(2) of the Act the bankrupt was required to submit his statement of affairs to the DGI within seven days of being adjudged a bankrupt but the bankrupt in the present case only filed his statement about three months after the date of the adjudication without providing any reasonable excuse for the delay. Yet, the DGI in his reports stated that the bankrupt had not committed any offence under the Act. That being the case, the court should have refused the conditional discharge or suspended the operation of the order until a dividend of not less than 50% had been paid to the JCs, as provided under s 33(4) of the Act (see paras 41 & 43).

(6) In considering the question of the bankrupt's discharge the court was bound to have regard to not only the interest of the bankrupt or of the JCs but also the interest of the public and of commercial morality. In allowing a discharge, the court must be very cautious in balancing between the interest of the bankrupt as an individual and the interest of the public and commercial reality at large. To allow an order for discharge

of the bankrupt in the present circumstances would make a mockery of the provisions of the bankruptcy law available to safeguard the interests of creditors. Bankruptcy law should not be used to defeat public interest (see paras 45, 49 & 51).

[Bahasa Malaysia summary

Sebelum dihukum bankrap, Lim Hun Swee ('si bankrap') merupakan pengarah dalam Filotek Sdn Bhd, Filotek Trading Sdn Bhd, Filotek Properties Sdn Bhd dan Filotek Holding Sdn Bhd dan memiliki kuasa pemeliharaan dan kawalan ke atas kesemua transaksi perniagaan syarikat-syarikat tersebut. Pada 23 November 2000, atas permohonan si bankrap, suatu perintah penghukuman dan penerimaan dimasukkan terhadapnya. Kemudian, pada 3 Jun 2003, si bankrap memfailkan suatu permohonan untuk perintah pelepasan di bawah s 33 Akta Kebankrapan 1967 ('Akta'). Ketua Pengarah Jabatan Insolvensi ('KP') menyediakan laporan bertarikh 26 Januari 2004 ('laporan pertama') untuk memudahkan penentuan permohonan tersebut, seperti yang dikehendaki s 33 Akta. Setelah mendengar bantahan-bantahan diutarakan pemiutang-pemiutang penghakiman, laporan pertama KP disusuli dengan dua laporan tambahan bertarikh 12 Mei 2004 ('laporan kedua') dan 2 Ogos 2004 ('laporan ketiga'). Menurut laporan kedua KP, hutang-hutang belum langsai si bankrap pada masa yang material berjumlah RM20,336,910.46, sementara itu baki kredit dalam estet si bankrap adalah RM37,442.38. Laporan tersebut juga menyatakan bahawa ahli keluarga bersetuju menyumbang sejumlah RM200,000 untuk membantu si bankrap menyelesaikan sebahagian hutang-hutangnya dan jumlah keseluruhan RM237,442.38 adalah mencukupi untuk mengisytiharkan dividen 1% kepada 32 pemiutang yang telah memfailkan bukti keberhutangan mereka kepada KP. Pada 23 Ogos 2004, penolong pendaftar memberikan pelepasan bersyarat kepada si bankrap yang mensyaratkannya membayar RM5,000 sebulan dalam masa lima tahun. Pemiutang-pemiutang penghakiman yang tidak berpuas hati merayu terhadap keputusan penolong pendaftar itu. Rayuan-rayuan tersebut ditolak hakim Mahkamah Tinggi tetapi hakim tersebut mengubah perintah bersyarat kepada bayaran sejumlah RM10,000 sebulan untuk tempoh sepuluh tahun. Si bankrap tidak berpuas hati dengan perubahan perintah bersyarat yang memerintahkannya membayar RM10,000 sebulan selama sepuluh tahun manakala empat pemiutang penghakiman ('empat PP') tidak berpuas hati dengan perintah pelepasan. Justeru, lima rayuan ini di hadapan mahkamah ini. Adalah hujahan empat PP bahawa ini bukanlah kes yang sesuai bagi hakim melaksanakan budi bicaranya untuk melepaskan si bankrap. Mereka berhujah bahawa KP gagal melaksanakan siasatan yang teliti terhadap urusan-urusan dan aset-aset si bankrap dan bahawa laporan-laporan KP tersebut tidak lengkap. Empat PP itu juga menghujah bahawa dividen 1% yang harus dibayar kepada 32 pemiutang untuk pelepasan tersebut adalah sangat rendah dan tidak mematuhi s 33(4) Akta, yang memerlukan sekurang-kurangnya 50% dividen dibayar kepada mereka. Si bankrap, sebaliknya menghujah bahawa keputusan

hakim untuk melepaskannya daripada kebankrapan adalah tepat kerana objektif utama kebankrapan adalah untuk membantu si bankrap menyelesaikan hutang-hutangnya dan membolehkannya memulakan hidup baru setelah dia dilepaskan mahkamah dan bahawa adalah bertentangan dengan kepentingan awam bagi seseorang kekal menjadi bankrap. Isu utama untuk ditentukan dalam rayuan-rayuan ini adalah sama ada pelepasan tersebut harus dibenarkan dalam keadaan-keadaan kes ini.

Diputuskan, membenarkan rayuan-rayuan PP tanpa perintah untuk kos dan menolak rayuan si bankrap tanpa perintah untuk kos:

(1) Dalam permohonan untuk pelepasan, si bankrap tidak dibenarkan mengambil kesempatan yang melampau terhadap laporan tak lengkap KP. Dalam kes ini, didapati bahawa laporan-laporan KP tersebut ringkas dan tidak lengkap. Fakta bahawa ketiga-tiga laporan disediakan oleh KP semasa pendengaran permohonan pelepasan menunjukkan bahawa KP tidak menjalankan siasatan dengan teliti. Malah laporan-laporan tersebut tidak menyatakan perbelanjaan bulanan si bankrap dan terdapat percanggahan dalam laporan-laporan tersebut tentang pendapatan si bankrap, yang membuatkan laporan tersebut tidak boleh dipercayai. Menurut laporan pertama, pendapatan si bankrap ialah RM3,500 sebulan tetapi laporan kedua menyatakan pendapatannya ialah RM3,000 sebulan. Tetapi, jika dakwaan si bankrap bahawa perbelanjaan bulanan RM1,200 diberikan kepada bekas isterinya, sewa rumah RM1,200, bayaran bulanan RM1,000 kepada KP, perbelanjaan peribadi RM800, dan tentunya 'EPF' dan potongan cukai pendapatan bulanan adalah benar, maka perbelanjaannya adalah melebihi pendapatan yang dikatakan iaitu RM3,500. Pada hakikatnya, ini dan persoalan-persoalan lain yang relevan hanya boleh dijawab jika KP telah menjalankan penyiasatan wajar yang teliti mengenai kesemua hal ehwal si bankrap. Perlu ada pendedahan yang penuh dan terus terang mengenai kesemua fakta yang relevan dan material di dalam laporan KP (lihat perenggan 18, 21–22, 29–30, 49 & 51).

(2) KP sepatutnya membuat siasatan mengenai kebenaran penyata pembayaran RM200,000 oleh saudara si bankrap dan apartmen milik syarikat ibunya untuk memastikan bahawa si bankrap tidak mempunyai aset tersembunyi sama ada di bawah namanya atau nama orang lain (lihat perenggan 26).

(3) Walaupun laporan oleh KP adalah keperluan mandatori di dalam permohonan untuk perintah pelepasan oleh si bankrap, ini tidak bermaksud bahawa mahkamah terikat untuk menerima kenyataan yang terkandung di dalam laporan tersebut. Mahkamah mempunyai kewajipan untuk meneliti kebenaran dan kebolehpercayaan kenyataan di dalam laporan tersebut dan tidak terikat untuk menerima kenyataan,

yang tidak lengkap dan mengelirukan. Ini adalah khususnya, seperti di dalam kes ini, di mana jumlah hutang yang terlibat adalah besar (lebih kurang RM25 juta); di mana kebankrapan dimulakan oleh si bankrap sendiri; permohonan untuk perintah pelepasan difailkan selepas dua tahun dan sepuluh bulan perintah penghukuman dan penerimaan diberikan; dan di mana dividen diisytiharkan adalah hanya 1% jumlah keseluruhan hutang (lihat perenggan 33).

(4) Di bawah s 33(6)(a) Akta, KP adalah bertanggungjawab untuk menyiasat secara spesifik dan memastikan fakta bahawa si bankrap telah terlepas daripada menyimpan rekod akaun yang mencukupi untuk mendedahkan transaksi perniagaan dan kedudukan kewangan dalam tempoh tiga tahun selepas kebankrapannya atau dalam tempoh yang lebih pendek yang dianggap munasabah dalam keadaan tersebut. Seksyen 33(6) memperuntukkan bagi 13 situasi berfakta, iaitu sub-s (6)(a)–(m) yang boleh menghalang mahkamah daripada memberikan perintah pelepasan atau untuk menggantung operasi perintah sedemikian. Walau bagaimanapun perintah KP tidak menyentuh perkara ini mahupun menunjukkan bahawa apa-apa penyiasatan dibuat mengenai perkara tersebut. Ini adalah ketidakcukupan yang melampau yang akan memudaratkan dengan teruk penggantungan ke atas laporan KP. Pada masa permohonan untuk pelepasan, situasi seperti yang dijangka di bawah s 33(6)(e), (f), (b) atau (m) telah wujud tetapi malangnya laporan KP gagal untuk memberikan penekanan kepada perkara ini untuk membantu mahkamah di dalam pertimbangannya dalam permohonan untuk perintah pelepasan (lihat perenggan 32, 34–36 & 38–40).

(5) Di bawah s 16(2) Akta, si bankrap diperlukan untuk mengemukakan penyata hal ehwalnya kepada KP dalam tempoh tujuh hari daripada diisytiharkan sebagai bankrap tetapi si bankrap di dalam kes ini hanya memfailkan penyatanya dalam tempoh tiga bulan selepas tarikh pengisytiharan tanpa memberikan apa-apa alasan yang munasabah untuk kelewatan tersebut. Tetapi KP di dalam laporannya menyatakan bahawa si bankrap tidak melakukan apa-apa kesalahan di bawah Akta. Oleh itu, mahkamah sewajarnya menafikan pelepasan bersyarat atau menggantung operasi perintah tersebut sehingga dividen yang tidak kurang daripada 50% telah dibayar kepada PP, seperti yang diperuntukkan di bawah s 33(4) Akta (lihat perenggan 41 & 43).

(6) Dalam menentukan persoalan pelepasan si bankrap mahkamah terikat untuk mempertimbangkan bukan hanya kepentingan si bankrap atau PP tetapi juga kepentingan awam dan prinsip moral perdagangan. Dalam membenarkan pelepasan, mahkamah mestilah amat berhati-hati dalam menimbangkan di antara kepentingan si bankrap sebagai seorang individu dan kepentingan awam dan realiti perdagangan secara luas.

Untuk membenarkan perintah pelepasan si bankrap di dalam hal keadaan ini akan bermaksud memperolok-olokkan peruntukan undang-undang kebankrapan yang wujud untuk melindungi kepentingan pemiutang. Undang-undang kebankrapan tidak sepatutnya digunakan untuk mematahkan kepentingan awam (lihat perenggan 45, 49 & 51).]

Notes

For cases on discharge of bankrupt generally, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2403–2425.

Cases referred to

Badcock, Re (1889) 3 Morr 138, DC (refd)

Dato' Abdullah Hishan bin Hj Mohd Hashim v Sharma Kumari Shukla [2000] 7 MLJ 667, HC (refd)

Lau Kah Lay, Re & Anor; ex p Cold Storage (M) Bhd [2001] 6 MLJ 311; [2001] 3 CLJ 960, HC (refd)

Matheson, Re (1862) 31 LJ Bcy 23 (refd)

Legislation referred to

Bankruptcy of Act 1967 ss 16(2)(a), (3), 17, 31, 31(1), (3), (4), 33, 33(1), (3), (4), 6(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (8), (12), 72

Appeal from: Bankruptcy No 29–3106 of 2000 (MT3) (High Court, Pulau Pinang)

Teja Singh (Teja Singh Penesar & Co) for the bankrupt.
SC Tan (Cheong Wai Meng & Van Buerle) for OCBC Bank.
Yuslinov Ahmad (Yuslinov Ahmad & Petra Oon) for Allianz General Insurance Co (Malaysia).
BK Cheah (See, Ramsun & Tan) for Overseas Assurance Corporations (M) Bhd.
Geetar Kaur (Hassan Subra & Associates) for Hong Bee Hardware Co Sdn Bhd.

Ramly Ali JCA (delivering judgment of the court):

[1] There are five related appeals being heard together. The first appeal (No P-03–125 of 2007) is by the bankrupt against part of the decision of the learned High Court judge dated 25 June 2007 whereby he was ordered to pay a monthly sum of RM10,000 for a period of 10 years as a condition of him being discharged as a bankrupt. The other four appeals (No P-03–137A of 2007, P-03–146 of 2007, P-03–172 of 2007 and P-02–624 of 2007) are by the respective judgment creditors ('JC') namely OCBC Bank (M) Bhd, Allianz General Insurance Co (M) Bhd, Hong Bee Hardware Sdn Bhd and Overseas Assurance Corporation (M) Bhd. Their appeals are against the decision of the learned High Court judge dated 25 June 2007 in affirming the earlier decision

of the deputy registrar of the High Court in granting a conditional discharge of bankruptcy in favour of the bankrupt.

FACTUAL BACKGROUND

[2] On his own application, a receiving order and adjudication order were made against the bankrupt on 23 November 2000.

[3] Subsequently, on 3 June 2003, the bankrupt filed an application for an order of discharge under s 33 of the Bankruptcy Act 1967. To facilitate the determination of the said application three reports pursuant to s 33(3) of the Bankruptcy Act 1967 were prepared by the Director General of Insolvency ('DGI') namely report dated 26 June 2004, additional report dated 12 May 2004 and another additional report dated 2 August 2004.

[4] On 23 August 2004, the learned deputy registrar granted a conditional discharge subject to the bankrupt being made to pay a sum of RM5000 per month for a period of five years.

[5] Being dissatisfied, all the judgment creditors (appellants in the other four appeals) appealed to the judge in chamber against the said decision of the learned deputy registrar. On 25 June 2007 the said appeals were dismissed, but the learned judge varied the conditional order to payment of RM10,000 per month for a period of ten years.

[6] The bankrupt was not satisfied with the variation of the conditional order requiring him to pay a sum of RM10,000 per month for a period of ten years; while all the four JCs were not satisfied with the discharge order. Hence, the five appeals before this court.

[7] It is pertinent to note that the bankrupt filed his application for a discharge under s 33 of the Bankruptcy Act 1967 only two years and ten months after the date of adjudication order AORO made against him. According to the additional DGI's report dated 12 May 2004, the amount of unsettled debts at the relevant time was RM20,336,910.46. The credit balance in the estate of the bankrupt at the material time was RM37,442.38. On top of that, the family members of the bankrupt have agreed to contribute a sum of RM200,000 to help the bankrupt to partly settle the debts. The total amount of RM237,442.38 is sufficient to declare dividend of 1% only to 32 creditors who had filed their proof of debts with the DGI.

[8] In their appeals, the judgment creditors contend that the bankrupt should not have been discharged of his bankruptcy mainly on the ground that

the reports by the DGI are incomplete and the DGI has failed to carry out a proper investigation into the bankrupt's affairs and assets. The judgment creditors also contend that dividend of 1% to be paid to the 32 creditors for the discharge is manifestly low and does not comply with the provisions of s 33(4) of the Bankruptcy Act 1967, which requires at least 50% dividend to be paid to the creditors. In general, all the judgment creditors in their appeals submit that this is not an appropriate case for the learned judge to exercise his discretion to discharge the bankrupt.

[9] The bankrupt on the other hand contends that the decision of the learned judge to discharge him from his bankruptcy is correct on the ground that the main objective of bankruptcy is to relieve the bankrupt from his debts and to enable him to make a fresh start as soon as he is discharged by the court. The bankrupt further contends that it is against public interest for an individual to remain a bankrupt and such situation is of no benefit to anyone.

FINDINGS OF COURT

[10] The application by the bankrupt for a discharge in the present case was made under s 33 of the Bankruptcy of Act 1967. Section 33(1) of the Act provides that a bankrupt may at any time after being adjudged bankrupt applies to the court for an order of discharge and the court shall appoint a date for the hearing of the application.

[11] Upon hearing the application the court may grant or refuse an absolute order of discharge; or grant a conditional discharge. Section 33(3) of the Act provides:

> (3) On the hearing of the application the court shall take into consideration a report of the Official Assignee as to the bankrupt's conduct and affairs, including a report as to the bankrupt's conduct during the proceedings under his bankruptcy, and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property.

[12] In dealing with the application for discharge the court shall take into consideration a report of the official assignee (the DGI) as to the bankrupt's conduct and affair, including a report as to the bankrupt's conduct during the proceedings under his bankruptcy. This is a mandatory requirement. Thus, in an application of this nature, a report of the DGI is very vital, in fact the most important consideration. Even though the court shall consider the DGI report as required under s 33(3), the court is not bound to accept it if the court is satisfied that the report is incomplete and unreliable or made based on

incomplete investigation into the conduct and affairs of the bankrupt. Without a proper or complete report by the DGI, the court cannot decide on the issue of discharge. The purpose of the DGI report is to secure a full and complete investigation and disclosure of all the material facts or informations relating to the bankruptcy particularly on issues stipulated under s 33(4) and (6) of the Act. The report is not only for the interest of the bankrupt and the creditors but also the interest of the public as well as the business community at large.

[13] In law, the DGI is duty bound to carry out a complete and efficient investigation. The report produced must be fair and not bias for or against the bankrupt or the creditors. This is in line with his duties entrusted upon him under s 72 of the Act, which provides:

> (72) As regards the debtor, the Official Assignee shall:
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> (a) investigate the conduct of the debtor, and report to the court stating whether there is reason to believe that the debtor has committed any act which constitutes an offence under this Act or under section 421, 422, 423 or 424 of the Penal Code or which would justify the court in refusing, suspending or qualifying an order for his discharge;
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> (b) make such other reports concerning the conduct of the debtor as the court directs or as may be prescribed;
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> (c) take such part as may be directed by the court or prescribed in the public examination of the debtor;
>
> (d) take such part and give such assistance in relation to the prosecution of any fraudulent debtor or any other person charged with an offence under this Act, as the Public Prosecutor may direct.

[14] The investigation must be carried out thoroughly and in detail to the extent allowable by law; and wherever possible the report produced must be comprehensive leaving behind no substantial 'question marks' to the court and the creditors as well. Under s 31(1) of the Act, the DGI may apply to the court, to summon before it the debtor, or spouse or any person known to have in his possession any of the estate belonging to the debtor or any person whom the court deems capable of giving information respecting the debtor, his dealings or property and the court may require such person to produce any documents in his custody or power relating to the debtor, his dealings or property. A mere assertion by the bankrupt alone is not sufficient to get the result as required under the Act. The DGI should get additional or corroborative information or evidence to substantiate the bankrupt's assertions. Relevant witnesses must be identified and interviewed for further evidence. Documentary evidence must be obtained wherever possible.

[15] If need be, to the extent allowable by law, the DGI must act with due diligence and write to banks, financial institutions, stockbrokers, clubs,

insurance companies and the Inland Revenue Board to obtain the bankrupt's financial records on his income tax returns, his wife's income tax returns, his credit cards statements, insurance policies, statements of accounts from his stockbrokers, bank's statements and club's bills. It is not the creditors' duty to carry out such investigation themselves. The primary duty is upon the DGI, to exercise his powers and duties entrusted by the Bankruptcy Act 1967.

[16] In difficult cases, the DGI is fully empowered to carry out his duties under the Act for the purpose of securing full and complete investigations into the affairs and conduct of a bankrupt. Section 17of the Act empowers the DGI to make an application to the court to hold public examination of the bankrupt to be examined as to his conduct; dealing and property. During such examination, any creditor who has tendered a proof of debt or his representative authorised in writing may question the bankrupt concerning his affairs and conduct. The DGI shall also take part in the examination. The court may also put such question to the bankrupt as it thinks expedient. The bankrupt shall be examined upon oath, and it shall be his duty to answer all such questions as the court puts or allow to be put to him.

[17] In appropriate cases, an examination of the bankrupt may be followed by the process of discovery of the bankrupt's property under s 31 of the same Act where the bankrupt's wife (or husband) or any person known or suspected to have in his possession any of the estate or effects belonging to the bankrupt or supposed to be indebted to the bankrupt or any person whom the court deems capable of giving information respecting the bankrupt, his dealings or property may be summoned before the court.

[18] The bankrupt in an application for a discharge cannot be allowed to obtain undue advantage of the weaknesses in the DGI's incomplete report. To borrow the words of Ian Chin J in the case of *Re Lau Kah Lay & Anor; ex p Cold Storage (M) Bhd* [2001] 6 MLJ 311; [2001] 3 CLJ 960, 'the OA carries the onerous task of ensuring that a bankrupt has no hidden assets stashed away, whether in his name or in the name of his wife or children, as otherwise people will be imbued with the message that money borrowed could be stashed away and need not be repaid and such horde can be enjoyed even when one is a bankrupt. If the office of the OA does not show itself equal to the task of preventing such rip-off of the creditor then cases of borrowers not repaying and not minding to be made bankrupt would be the rule rather than the exception. Then, business morality would decline'.

[19] We have heard cases where bankrupts live a life of luxury, staying in big bungalows, driving expensive cars (sometimes chauffer driven), going on overseas trips, enjoying club memberships and many others. All such matters give rise to a suspicion and very highly at that, the possibility existed that the

assets of the bankrupt may have found their way to their spouses, relatives and other close associates. It is the paramount duty of the DGI (and the court as well) to ensure such a situation do not occur.

[20] In the present case, it is noted that the DGI's report is both brief and incomplete. Three reports were prepared by the DGI, dated 26 January 2004, 12 May 2004 and 2 August 2004 respectively. The two additional reports were prepared after hearing arguments or objections raised by the creditors. The fact that three reports were prepared by the DGI during the hearing of the discharge application shows that it was not a thorough investigation by the DGI's officer.

[21] Further, from the reports it was stated that the bankrupt paid RM500 per month to the DGI since March 2001 but subsequently the monthly payment was increased to RM1,000 since May 2002. There is no mention of the bankrupt having any other means of income besides what he had disclosed. The monthly expenses of the bankrupt were not mentioned in the reports. However, taking into account of the monthly expenses disclosed subsequently (at the application for stay of High Court judge order) the monthly expenses of the bankrupt is around RM5,200 per month without taking into account deductions of the EPF and monthly income tax. In addition, how could the bankrupt pay RM500 per month since March 2001 but only started work on 1 January 2002 with BTQ Sdn Bhd as 'Chief Operating Officer'?

[22] There is a contradiction in the reports prepared by the DGI as to the income of the bankrupt. At para 16 of the first report, it was stated that the bankrupt earned RM3,500 per month and paid RM1,000 monthly to the DGI. Whereas at para 4 of the additional report No 2, it was stated that the bankrupt earned RM3,000 per month since 1 January 2002.

[23] The particulars of the bankrupt's income after the discharge are also doubtful. From the particulars of account furnished by the DGI, it seems that the bankrupt was not earning RM10,000 per month after the discharge but at least RM19,300 per month for the month of December 2005, March 2006, June 2006, February 2007, April 2007 and May 2007. However at all times until today, the bankrupt is maintaining that he earns RM10,000 or slightly more just enough for the monthly expenses of RM10,200 per month. Prudent calculation would lead to a conclusion that he is earning more than RM19,300 per month. He alleges that he only earns RM10,000 per month, and no mention of any side income, then the assumption is that there is some money stashed away but not disclosed to the DGI.

[24] There is also no investigation as to the payment of RM200,000 by his relative into the account with the DGI should the conditional discharge is allowed by court. The DGI should have investigated the truth of the statement in detail, and not to rely solely on the statement of the bankrupt.

[25] Further it was stated in the report dated 26 January 2004 that the bankrupt stayed with his mother in an apartment at Jalan Kelawai, Pulau Pinang owned by his mother. But in the additional report No 2, it is stated that the apartment was owned by a company known as Mega Pesona Sdn Bhd in which his mother was a majority shareholder with four shares out of a total of seven shares at RM1 per share. How could a company with RM7 paid up capital own an apartment at Jalan Kelawai? Further, the deed of assignment for the said apartment shows that the original buyer of the apartment was the bankrupt and then it was subsequently sold to Mega Pesona Sdn Bhd.

[26] There should be an investigation by the DGI of the payment of RM200,000 by the relative of the bankrupt and the apartment owned by Mega Pesona Sdn Bhd to ensure that the bankrupt has no hidden assets stashed away whether in his name or others.

[27] The bankrupt alleged that he pays monthly alimony to his former wife and maintenance to his child of RM1,200 but the document showed otherwise. According to the additional report No 2, there is no such settlement of assets or alimony of maintenance during the joint petition for divorce.

[28] The bankrupt further alleged that he pays a monthly house rental of RM1,000 but nowhere mentioned in the reports that he paid such a rental. In fact, according to the reports, the bankrupt was staying with his mother at his mother's company owned apartment.

[29] If the payment of RM1,200 to his former wife and house rental of RM1,000 is true, then the monthly expenses at the time of his alleged salary of RM3,500, would be more than RM3,500, taking into account of his monthly payment of RM1,000 to the DGI, personal expenses of RM800 and of course for EPF and monthly income tax deduction.

[30] There are a lot of questions need to be answered in the reports. There are also a lot of re-calculations to be made in respect of the actual income and expenses of the bankrupt. Those questions can only be answered and clarified satisfactorily if the DGI had carried out a proper, thorough and complete investigation of the full affairs and conduct of the bankrupt.

[31] Under s 33(4) of the Bankruptcy Act 1967, on proof of any of the facts mentioned in sub-s (6) the court shall either refuse the order for discharge; or

suspend the operation of the order for a specified time; or suspend the operation of the order until a dividend of not less than 50% has been paid to the creditors; or grant an order of discharge subject to such conditions as aforesaid.

[32] Subsection (6) provides for 13 factual situations (ie sub-s (6)(a)–(m) which the existence of any one of them could bar the court from granting an order for discharge or to suspend the operation of such order. All the 13 facts must be fully investigated by the DGI before coming out with any finding whether those facts do exist or not. A general statement to the effect that 'none of the facts under s 33(6) of the Act exist (as found in the DGI's report) is clearly insufficient if there is no proper and complete investigation being carried out on each and every situation listed under paras (a)–(m).

[33] The court is aware that on the hearing of an application for an order of discharge, the court shall take into consideration a report by the DGI. This is a mandatory requirement. However, it does not mean that the court is bound to accept the statements therein contained. No doubt sub-s (8) of s 33 provides that for the purpose of an application for a discharge the DGI's report shall be prima facie evidence of the statements contained therein; but the court is duty bound to scrutinise the truth and reliability of the statements and in appropriate case, when the court is satisfied that the report is incomplete and misleading, the court is not bound to accept the statements contained in the report. This is particularly so, as in the present case, where the amount of debts involved are huge (about RM25m); bearing in mind the bankruptcy was initiated by the bankrupt himself (not by any of the creditors); the application for an order of discharge was only filed two years ten months after the AORO was granted; and the dividend declared is only 1% of the total debts. The status of prima facie evidence as provided under sub-s (8) is rebuttable, and not conclusive.

[34] Under s 33(6)(a), the DGI is duty bound to specifically investigate and ascertain the fact whether the bankrupt has omitted to keep such books of account as to sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy or within such shorter period immediately preceding that event as the court deems reasonable in the circumstances. In the present case, the DGI reports fail to touch on this matter. No indication to show that an investigation was specifically done on this matter. No mention of the bankrupt's financial affairs and business transactions carried out during the three years period immediately preceding the granting of the bankruptcy order. This is a gross insufficiency that would badly affect the reliability of the DGI reports.

[35] In the present case, the bankrupt was a director in Filotek Sdn Bhd, Filotek Trading Sdn Bhd, Filotek Properties Sdn Bhd and Filotek Holding Sdn Bhd. He was the operating and controlling mind of the company Filotek Holding Sdn Bhd, having care and control of all its business transactions. In struggling to expand it's operations with the intention to list it on the stock exchange there is indications to show the bankrupt had conducted its business recklessly and without due care and reasonable diligence, particularly towards the end of 1990's during the period of recession. The bankrupt may have *brought on or contributed to his bankruptcy by rash and hazardous speculations; by recklessness or want of reasonable care and attention to his business and affairs* as envisaged under s 33(6)(e). Unfortunately, the DGI reports fail to highlight on this matter in order to assist the court in its determination on the application for an order of discharge.

[36] The court also found that the bankrupt has delayed or put his creditors to unnecessary expense by frivolous or vexatious defence to various actions or other legal proceedings properly brought or instituted by the some of the creditors against him. This can be seen from the defence and appeal filed by him. In his defence, it was alleged that he was never a guarantor and never signed the guarantee for the principal borrower. In the defence of the principal borrower (where the bankrupt was the operating mind) the principal borrower also denied having taken any loan or signed any securities document. Yet, after the adjudication he submitted the debts to the DGI including the debts to the appellants. This goes to show that a factual situation under s 33(6)(f) of the Act already existed at the time of the application.

[37] For the purpose of an application for an order of discharge under s 33, there is a presumption created under sub-s (12) ie if at anytime after the expiration of six months from the date of the adjudication the DGI reports to the court that the value of the assets which have been realised, together with the estimated value of the assets which are realisable, is insufficient to pay a dividend of 50% on the debts proved in the bankruptcy, it shall be presumed, until the contrary is proved, that the bankrupt has continued to trade after knowing or having reason to believe himself to be insolvent.

[38] According to the DGI's first report, which was made after the period of six months from the date of his adjudication, the bankrupt only has furniture worth RM2,000 at the time of his adjudication. This clearly was not enough to declare a dividend of 50% on the debts proved in his bankruptcy. Thus the above presumption applies ie *he has continued to trade after knowing or having reason to believe himself to be insolvent*. There is no contrary evidence adduced, either by the bankrupt himself or the DGI reports. Therefore, a factual situation under s 33(6)(b) of the Act exists.

[39] The court is also of the view that the factual situation under s 33(6)(m) is also applicable to the facts of the present case ie *that the bankrupt's assets are not of a value equal to 50% of the amount of his unsecured liabilities, unless he satisfies the court that the assets are not of a value equal to 50% of his unsecured liabilities has arisen from circumstances for or in respect of which he cannot justly be held blameable.*

[40] The fact that the bankrupt's assets (realised and likely to be realised) are not of a value equal to 50% of the amount of his unsecured liabilities in the present case is not in dispute. The bankrupt has failed to satisfy the court that the fact that the assets are not of such a value has arisen from circumstances for which he cannot justly be held blameable. The DGI's reports on this issue are of not much help either. The DGI has failed to highlight this matter satisfactorily in his three reports.

[41] Section 33(4) of the Act, inter alia, provides that where a bankrupt has committed any offence under the Act, the court shall either refuse the discharge or suspend the order until a dividend of not less than 50% has been paid to the creditors but the DGI may for special reasons extend the time by order made under his hand, to be forthwith filed, and recording the reasons for such an extension. In the present case the adjudication order was made on 23 November 2000, on the bankrupt's own application (not by any creditors). The bankrupt is required under s 16(2)(a) of the Act to submit his statement of affairs with the DGI within seven days from his being adjudged bankrupt. However, the bankrupt in the present case only filed his statement of affairs with the DGI on 21 February 2001, about three months after the date of the adjudication. There is no mention in the DGI's reports that an extension of time has been granted to the bankrupt to file the statement of affairs out of time or any reasonable explanation or excuse by the bankrupt for his delay in filing the statement of affairs in the DGI's reports; and yet the DGI in his reports states that the bankrupt did not commit any offence under the Act.

[42] Section 16(3) of the Act provides that if the bankrupt fails, without reasonable excuse, proof whereof shall lie on him, to comply with the requirement, he shall be guilty of contempt of court and may be punished accordingly. The court has treated such non-compliance of s 16(3) of the Act as very serious and had imposed custodial sentence on the bankrupt (see *Dato' Abdullah Hishan bin Hj Mohd Hashim v Sharma Kumari Shukla* [2000] 7 MLJ 667). Thus, there is no doubt that a contempt of court action under s 16(3) is an offence under the Act. The bankrupt in this present case has clearly committed an offence under s 16(2) punishable under s 16(3) of the Act. Yet, the DGI in his reports had the audacity to state that *the bankrupt did not commit any offence under the Act.*

[43] That being the case, the court should have refused the conditional discharge or suspend the operation of the order until a dividend of not less than 50% has been paid to the creditors, as clearly stipulated by the first limb of s 33(4) of the Act. There is no special reason otherwise determined by the court on this matter and the 1% dividend declared was manifestly below the minimum requirement of 50% under the said provisions.

[44] Learned counsel for the bankrupt submitted that the bankrupt should be discharged on the ground that on giving up the whole of his property, he shall be a free man again, able to earn his livelihood and having the ordinary inducement to industry. He further submitted that where it is against public interest for an individual to remain a bankrupt and such situation is of no benefit to any one, an order for discharge should be made.

[45] In this respect the court cannot agree fully with learned counsel's submission. The court is of the view that in considering the question of bankrupt's discharge the court is bound to have regard not only to the interest of the bankrupt or of the creditors alone, but also to the interest of the public, and of commercial morality (see *English and Empire Digest,* Vol 4, (1970 Reissue) at p 590, para 5229).

[46] In an application for a discharge, each case has to depend upon its own individual circumstances (see *Re Matheson* (1862) 31 LJ Bcy 23). The DGI's report is very essential to assist the court in its consideration and determination. Without a proper and complete report on all the relevant issues the court will not be able to exercise its judicial discretion. Thus, in preparing the report, the DGI must appreciate the importance of his investigations and report, failing which the report would be unreliable and the application by the bankrupt for a discharge would ultimately be refused.

[47] The court agrees that in some appropriate cases, an individual should not remain a bankrupt and he should be able to make a fresh start as soon as he is discharged by the court. On the other hand, the court also appreciates that in bankruptcy matters, the DGI must investigate into the reason for the bankrupt's insolvency so that the interest of the creditors and the public are protected. A discharge may be refused where the bankrupt has been guilty of misconduct in a trade (although not guilty of any specific offences mentioned in s 33 of the Act). A man who finds himself insolvent ought not to continue to do business in the hope of righting himself. He is not carrying on business at his own risk, but at the risk of innocent persons who knows nothing about his condition (see *Re Badcock* (1889) 3 Morr 138 (DC) as reported in William, *Law and Practice in Bankruptcy* (18th Ed)).

[48] An order for a discharge under s 33 of the Act should be an 'exception to the rule' which should only be allowed in special circumstances, where the bankrupt is genuine businessman or trader who becomes insolvent not through any fault, moral or otherwise, but through just being caught at the wrong turn of the economic cycle. On the other hand, the provisions of s 33 of the Act must be strictly complied with and should not be abused by people who have used dishonest and fraudulent methods in conducting their business affairs to the detriment of their creditors and gain an undeserved advantage from their own wrongdoings.

[49] In some appropriate and deserving genuine cases, a bankrupt should be discharged from his bankruptcy, but not at the expense of commercial morality and public perception on bankruptcy law in the country. In allowing a discharge, the court must be very cautious in balancing between the interest of the bankrupt as an individual and the interest of the public and commercial reality at large. The application for a discharge can easily be abused especially in cases where the DGI has failed to carry out proper and complete investigation into the affairs of the bankrupt. There must be full and frank disclosure of all the relevant and material facts in the DGI's reports.

[50] It must be noted that in the interest of the public, commercial morality must be preserved at its highest level at all times. Bankruptcy law should not be used to defeat this goal. An order for a discharge should not be granted easily without proper and complete investigation into the affairs of the bankrupt. The public as well as commercial players should not be imbued with the perception that a person can easily borrow money (even in big amount) from financial institutions or create debts with other business creditors, then stash the money away, whether in his own name or any related persons and need not be repaid; then personally apply for a bankruptcy order against him (as in the present case) and after a short period apply for an order for a discharge with a minimum or too little dividend to be paid to the creditors, and after the discharge he can enjoy a luxury life. If this practice and perception is not checked, then commercial morality would decline. In this type of fiasco, the court and the DGI should be blamed for not carrying out their duties effectively under the bankruptcy law.

CONCLUSION

[51] Based on the above considerations, this court finds that it is unsafe to adopt and rely on the reports prepared by the DGI especially when there seems to be no proper and complete investigation as to the assets, income and expenses of the bankrupt. The reports contain contradictions, brief in nature and thus unreliable. To allow an order for a discharge of the bankrupt in the present circumstances would make a mockery of the provisions of the

bankruptcy law available to safeguard the interest of creditors. It will not only lead to a decline in business morality but will also result in great injustice to legitimate creditors.

[52] For all the above reasons, this court unanimously allows all the four appeals by the judgment creditors, namely appeals Nos P-03–137A of 2007, P-03–146 of 2007, P-03–172 of 2007 and P-02–624 of 2007, with no order as to costs. Deposits to be refunded to the respective judgment creditors. Consequentially, the bankrupt's appeal vide appeal No P-03-125 of 2007 is dismissed with also no order as to costs. Deposits to be paid to the DGI.

Appeals by JCs allowed with no order as to costs and bankrupt's appeal dismissed with no order as to costs.

Reported by Kohila Nesan